



OXFORD JOURNALS  
OXFORD UNIVERSITY PRESS

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Source: *Publius*, Vol. 25, No. 2 (Spring, 1995), pp. 29-44

Published by: Oxford University Press

Stable URL: <http://www.jstor.org/stable/3330826>

Accessed: 21/11/2009 10:27

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# Values and Value Tradeoffs in Federalism

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*Federalism in various forms has long been associated with certain values of peace, security, liberty, democracy, innovation, efficiency, and equity—all of which have assumed heightened importance in the contemporary era. However, the institutionalization of such values under the power-sharing requirements of a federal arrangement often have proved difficult not only because of empirical conditions but also because of normative tradeoffs needed to balance competing values as well as contrary consequences of value choices. Simpler solutions might be available in principle, but under conditions of human diversity, federal solutions may be necessary.*

Major events around the world in recent years have brought federalism and the values often associated with federalism into high relief. The fall of the Berlin Wall in 1989 especially sparked a rush of interest in federalism and related questions of decentralization and devolution as the end of an empire liberated numerous peoples from centralized tyranny. By discrediting an ideology of “democratic centralism,” the subsequent collapse of the Soviet Union also made it more acceptable to speak of federalism in the same breath as political reform and liberal democracy. The contempt for federalism held by many political progressives for whom the French Revolution had been the touchstone of democracy was replaced by an openness to federal ideas and, in some cases, by a certain enthusiasm, even for the federalism of the American Revolution. As Carlos Fuentes wrote in 1990: “My hope is that we will witness a reevaluation of the federalist theme as a compromise between three equally real forces—the nation, the region, and the world. To this end, *The Federalist Papers* should be distributed in the millions.”<sup>1</sup>

Less dramatic perhaps, but no less important, has been the incremental construction of the European Union, a potentially federal, or confederal, arrangement among established democracies seeking to secure peace and advance prosperity. The European Union is unique, but it nevertheless reflects emerging governance issues in a world in which peoples and places have become closely connected by technology, and in which individuals have been made more mobile by that technology, both physically and electronically. The need for international

<sup>1</sup>Carlos Fuentes, “Federalism Is the Great Healer,” *Los Angeles Times*, 16 December 1990, p. M1.

governance arrangements has become more apparent, even while pressures for local self-government by discrete peoples in distinct places have become more strident. Hence, there is the seeming paradox of global integration and regional fragmentation<sup>2</sup> occurring simultaneously as the old-style nation-state struggles to maintain a place for itself in a world where the historic attributes of national sovereignty are being eroded by transnational and subnational political forces and economic imperatives.<sup>3</sup> This, too, sounds like a job for federalism, the approach to governance that seeks to combine unity and diversity.<sup>4</sup>

### INKBLOT PERCEPTIONS OF FEDERALISM

Yet, in the afterglow of enthusiasm for a new world order of peaceful, free-trading democracies, it has become apparent that building democracies and governance arrangements for global prosperity, whether federal or not, is not easy. The word "federalism," moreover, evokes quite different perceptions and connotations in different historical and cultural contexts. For many British opponents of the European Union, for example, the idea of a federal Europe, especially when it is advanced by French advocates, implies excessive centralization. In some parts of the former Soviet Union, federalism is associated unfavorably with the centralized federal constitution of the Union of Soviet Socialist Republics (USSR). For still others, federalism means separatism. The Kurds' insistence on a federal arrangement for a post-Hussein Iraq, Basque discussions of a federal Spain, and federalist assertions by many other communal groups all evoke fears of separatism and fragmentation of the integrity of the nation-state. Likewise, movement toward a federal Europe would raise the prospect of a Europe of the Regions. Why should distinctive regions within member states, such as Scotland, Wales, and Catalonia, cling to their home states when they could be represented directly in the governing institutions of a federal union? At times, therefore, decentralization and subsidiarity are acceptable terms in political discourse, but not federalism. Similarly, in some unitary states, such as Japan, decentralization may be embraced as acceptable reform while federalism is rejected as a radical departure from the possible and desirable.

Federalism has also been advanced as a means to accommodate communal diversity in plural societies. Yet, accommodation encounters many obstacles, beginning with the fundamental question of whether the groups to be accommodated really wish to be accommodated within a common polity. In some cases, the numerically dominant communal group wishes to assert its language, values, and prerogatives nationwide. Federalism may be seen in some quarters, as among many Africans in South Africa, as a device to frustrate true majority rule. In other

<sup>2</sup>Guy Laforest and Douglas Brown, eds., *Integration and Fragmentation: The Paradox of the Late Twentieth Century* (Kingston, Ontario: Institute of Intergovernmental Relations, Queen's University, 1994).

<sup>3</sup>See, e.g., Hans J. Michelmann and Panayotis Soldatos, eds., *Federalism and International Relations: The Role of Subnational Units* (Oxford: Clarendon Press, 1990).

<sup>4</sup>Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987).

cases, the communal group laying claim to national territory, such as the Kazakhs in Kazakhstan, are a numerical minority and, therefore, desire to assert their national identity through a unitary government structured to give them control of the nation-state. In still other contexts, such as the former Czechoslovakia, federalism may mean being yoked unwillingly to a partner or partners who are either domineering or continually in need of subsidies.

In some places, ideologies or religious systems stand as obstacles to federal arrangements. As one observer notes of Iraq, Islamist groups, including many anti-Hussein reformers, postulate

that the unifying cement holding Iraq together must be its Islamic identity. Since Islam cannot and should not differentiate between believers, the nationality question is often given short shrift, and the centralizing and proselytizing features of the Islamic state are given preeminence. Kurdish and other aspirations are reduced to folkloric or cultural manifestations, and these are tolerated within the firmament of the Islamic order.<sup>5</sup>

Indeed, resentment by nationality groups of their demotion to ethnic groups or mere cultural curiosities contributes to resistance to accommodation. In turn, conflicts over the distribution of national resources and the control of resources within communal territories add to the difficulties of accommodation.

Federalism is also pulled to the left and right of politics. While federalism is linked to political reform and democratization in some political systems where corrupt centralization has been the norm, such as Mexico and parts of the former Soviet Union, federalism continues to be linked to political conservatism by many Americans for whom federalism evokes "states' rights," particularly state defenses of reactionary policies, such as racial segregation. It is commonly observed that federalism receives its warmest reception from Republicans and conservative members of the U.S. Supreme Court.<sup>6</sup> Democratic presidential slogans have heralded a New Deal, Fair Deal, New Frontier, Great Society, and now Bill Clinton's New Covenant. Republican presidents have championed New Federalism.

These diverse views of federalism might lead one to conclude that federalism is a concept without content or that it is a kind of Rorschach test for the politically challenged. Alternatively, one might conclude that federalism is a concept rich with potential, and, like any concept, gets bent out of shape in the heat of political debate. Given that there is no single formula for federal governance, advocates of different federal arrangements emphasize different values, and perhaps it is the values and objectives of federal solutions to political problems that need to be clarified more than federalism itself.

If one begins with the basic idea of federalism as covenant, then the threshold question is: Is there a voluntary will to federate, or at least a reasonably voluntary

<sup>5</sup>Ali Allawi, "Federalism," *Iraq Since the Gulf War: Prospects for Democracy*, ed. Fred Hazelton (London: Zed Books, Ltd., 1994), p. 215.

<sup>6</sup>See, e.g., Charles Rothfeld, "Federalism in a Conservative Supreme Court," *Publius: The Journal of Federalism* 22 (Summer 1992): 21-31.

will under given historical circumstances and political alternatives? President Abraham Lincoln, for example, likened the American federal union to a “regular marriage,” which, for him, meant a voluntary perpetual marriage from which there could be no divorce. The question of divorce, however, becomes more salient in a shotgun marriage, a marriage of convenience, or a marriage in which one partner was sold without his or her consent. The nature of consent to covenant, therefore, is critical for the legitimacy and perpetuation of the federal arrangement. Where there is no will to federate, a nonfederal arrangement may not be possible either, or not without violence and rights suppressions.

The second question in federating is: Why covenant together? What values are to be emphasized and what objectives, limited or comprehensive, are to be achieved by a federal arrangement? In some cases, the values to be maximized may lean toward diversity, which opponents may label “separatism” in the course of debate, or toward unity, which opponents may label “centralism.” In turn, the answers to these questions may influence attitudes toward the first question by creating incentives or disincentives for a will to federate.

The third question is: What type of constitutional power-sharing will gain consent and achieve the desired values and objectives of the parties to federation? It is here where the concept of federalism often seems to break down because different constitutional arrangements are possible, and are already evident among existing federations. But federalism does not lend itself to a single or simple formula. Even such basic questions as the locus of residual powers following the constitutional division of powers may be resolved by locating residual powers in the constituent governments in one polity and in the general union government in another. The decision may rest in part on whether a federal process is one of bringing together dissociated states or one of disaggregating a centralized state, or on whether sovereignty is understood to reside in a diversity of peoples or in the unity of a people. In either case, federalism entails a consenting relationship among peoples of various territorial jurisdictions forged through bargaining and negotiation leading up to and following after the moment of constitutional agreement.

Here, we will focus on the values often associated with federalism. These values are not always easy to discern, and the numerous federal-like proposals which have bubbled up around the world would require a far-reaching analysis beyond the scope of this initial exploration. Furthermore, different federal arrangements reflect different value emphases, and particular values may rise and fall in prominence over time within a federation. Within these limits, however, we can rely on certain classic and long-standing expressions of federal values to examine key issues in federal approaches to governance.

### PEACE AND PROSPERITY

Certainly if one begins with *The Federalist*, then domestic peace and a common defense loom as significant values of federalism. The Federalists argued that small, territorially contiguous republics are vulnerable to the divide-and-conquer

tactics of foreign aggressors and to domestic violence arising from squabbles among themselves. This is a classic rationale for federating republics into leagues and alliances. Indeed, some observers have defined federalism as little more than a high-level mutual defense pact.<sup>7</sup>

This rationale is not yet outmoded everywhere. Advocates of European union after World War II sought, among other things, to secure peace on the continent and, then, a united defense against a new potential aggressor. Newly independent eastern countries seeking accession to the now developed European Union are motivated, in part, by the same concerns. Questions of federal arrangements for mutual peace and security remain relevant in parts of Asia, the Middle East, and perhaps Africa as well.

Alexis de Tocqueville argued that American federalism had, in his day, succeeded for forty-six years because the United States was separated from Europe by an ocean. Such a federal experiment in Europe would be doomed by predatory principalities. "A nation that divided its sovereignty when faced by the great military monarchies of Europe would seem to me, by that single act, to be abdicating its power, and perhaps its existence and its name."<sup>8</sup> Perhaps Tocqueville was largely correct, although Switzerland did emerge and survive as a federal polity in the midst of warfare on the continent. Nevertheless, construction of the European Union may not have been possible without the security umbrella of the North Atlantic Treaty Organization (NATO), and similar arrangements in other regions susceptible to military conflict may not be possible without external security guarantees. The presence of a security umbrella or the absence of any real threat, moreover, opens the door for a range of federal arrangements, from more loosely structured confederal schemes to more tightly knit federal structures like that of the United States.

Peace and security, however, were not the only objectives of American federalists in the 1780s or of European unionists in the 1950s. Both recognized that a federal or multinational cooperative arrangement founded and maintained only as a mutual defense or security pact would not likely develop institutions and values able to sustain the arrangement much beyond immediate threats and perhaps even in the face of dire threats. A mutual defense or security pact need not be more than an alliance or league of otherwise sovereign, border-protecting states.

An ultimately more important value to be achieved by union was prosperity through establishment of a common market. Peace and security are prerequisites for prosperity but are not in themselves sufficient to bind citizens and their constituent states together through common economic relationships. A common market lowers trade barriers between jurisdictions, reduces the potential for military conflict arising from trade disputes, expands the space available for entrepreneurial activity, and makes more goods and services available to citizens.

<sup>7</sup>William H. Riker, *The Development of American Federalism* (Boston, Mass.: Kluwer, 1987).

<sup>8</sup>Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, ed. J. P. Mayer (Garden City, N.Y.: Doubleday Anchor Books, 1969), p. 170.

Modern democratic federalism has generally been associated with market economies, in part because federalism disperses power and places countervailing limits on the powers of governments. These limits help to protect property rights along with other rights. Furthermore, a market economy, like a federal arrangement where power is constitutionally divided and shared rather than simply decentralized from center to peripheries, operates in a noncentralized manner. Many governments make decisions and take action without a central guidance mechanism, although forces for monopolization arise in both market and federal systems. The contemporary spread of market economies may create normative and socioeconomic conditions conducive to federalism because key characteristics of markets complement those of federalism, namely: the importance of contractual relationships between consenting persons and organizations in a market economy; entrepreneurial self-governance; consumer rights consciousness; interjurisdictional mobility and competition as well as cooperation; the diversity rather than homogeneity on which markets thrive; the realization that people need not like each other to benefit each other; the emphasis in market competition on individual and group talent and merit; and the resistance of markets to institutional centralization and immortality.

The coexistence of federalism and a nonmarket economy is more problematic. A planned economy requires a central planner lodged in a national government strong enough to enforce systemwide plans. Discretion may be available for regional and local planning, but those plans cannot move far from conformity to national plans, and approvals of those plans by national officials may entail costly delays and political maneuvering. If the general government, moreover, is the predominant owner of land and capital or controls the dominant economic institutions, it is also likely to be the dominant political force in the federal system with an appetite for centralization. If the constituent governments are the predominant owners of land and capital, there are likely to be strong pressures to weaken or fragment the federal system.

A common-market economy nevertheless requires a government framework, one that calls for more constitutional rules and institutional sophistication than a mutual defense pact. Such a framework raises fundamental questions of governance, especially democratic governance, because the powers needed to maintain and regulate a common market of any significance beyond a customs union necessarily intrude into many areas of public and private life. A federal framework, of course, is not the only option, but the larger and more diverse the territorial scope of the common market, the greater the likelihood of the need for a federal arrangement. A government, however democratic, encompassing a large, diverse, and potentially prosperous territory is susceptible to monopolistic temptations that may go unchecked in the absence of countervailing governments.

The design of a government framework for a common-market economy, however, raises a fundamental challenge for federalism because the power needed by the general government to maintain free trade can easily override constituent powers of self-government. As a general proposition, one can anticipate that increased free trade decreases the scope of local self-government. Free trade in

a common market necessarily implies the obliteration of jurisdictional barriers to trade. In addition, enforcement of the rules needed to maintain the free movement of commerce may require a very strong general government.

Powers to regulate domestic and foreign commerce in a free-trading common market must be lodged in the general government, but, then, the exercise of many powers of local self-government can be said to affect commerce, however remotely, as in the United States where from 1937 to 1995, the U.S. Supreme Court was unable to find a reason to void any federal government regulation of activities remotely connected to commerce as a violation of the states' reserved powers under the Tenth Amendment to the U.S. Constitution.<sup>9</sup> The development of regional agreements, such as the North American Free Trade Agreement (NAFTA), and of global accords, such as the General Agreement on Tariffs and Trade (GATT), pose further challenges to local and regional exercises of power held to be trade restrictive.<sup>10</sup>

Although these agreements are often regarded as being among the factors eroding national sovereignty today, they also strengthen the domestic powers of national governments because they must enforce the free-trade rules against their regional and local governments. Regional and local governments can avoid certain national enforcement interventions by voluntarily lowering barriers, harmonizing regulations through intergovernmental agreements, and mutually recognizing standards<sup>11</sup>; however, the effect is essentially the same—less discretion for self-governing choices.

Difficult choices between free trade and local self-government are most pertinent to federal arrangements because they are ordinarily established in part to sustain democratic self-government by constituent communities, and powers are divided and shared to ensure adequate operations of the general and constituent governments. It is ordinarily assumed that the powers of constituent self-government are to be substantial, not marginal or cosmetic.

## DEMOCRACY AND LIBERTY

The modern form of federalism forged in 1787 by the framers of the U.S. Constitution made large-scale democracy possible for the first time in history. The United States is the first continental-size polity to be governed in a reasonably democratic manner. Today, the territorially largest political societies having a claim to democracy are formally federal: Australia, Brazil, Canada, India, the United States, and now perhaps Russia.

<sup>9</sup>In 1995, the Supreme Court struck down, in a 5-4 decision, the federal Gun-Free School Zones Act of 1990, which made it a federal offense for an individual to possess a firearm in a school zone. Similar laws had already been enacted by thirty-nine states. The Court held that a student's mere possession of a gun near a school did not constitute an act of interstate commerce subject to federal law enforcement. See *United States v. Alfonso Lopez*, 131 L.Ed.2d 626 (1995).

<sup>10</sup>Conrad Weiler, "Foreign-Trade Agreements: A New Federal Partner?," *Publius: The Journal of Federalism* 24 (Summer 1994): 113-133.

<sup>11</sup>See, e.g., Anne Mullins and Cheryl Saunders, eds., *Economic Union in Federal Systems* (Annandale, NSW, Australia: The Federation Press, 1994).



As Tocqueville observed, this modern form of federalism made democracy more viable and secure on both a large and a small scale. It did so on a large scale by establishing, through the consent of the people of the constituent states, a strong but still limited general government possessing constitutionally delegated powers to be exercised in the general interest of the whole polity. This general government is, as Alexander Hamilton noted in *Federalist 15*, a real government because it possesses direct authority over individuals within its sphere of power. Under the Articles of Confederation of 1781, the general government could not touch the person of the citizen; it could act only through the constituent governments. Furthermore, under the new federal Constitution, citizens elected members of the U.S. House of Representatives and indirectly elected the president, while each state legislature selected two members of the U.S. Senate. Hence, James Madison called the new federalism of 1787 "neither wholly national nor wholly federal" (i.e., confederal).

In turn, the general government secured the democracies of the constituent republics both by shielding them from foreign and domestic aggression and by serving as a potential check on the rise of petty tyranny, which both the American founders and Tocqueville recognized as being a weakness of small, independent democratic republics. The U.S. Constitution, for example, obligates the federal government to "guarantee to every State in this Union a Republican Form of Government."<sup>12</sup>

By providing not only for a democratic general government but also for numerous smaller arenas of democratic self-governance (e.g., 50 U.S. states, 84,955 local governments, and governing mechanisms created by interstate compacts and interlocal agreements), federalism offers citizens many opportunities to hold elected office (e.g., 497,692 elected positions in the United States) and otherwise participate in public affairs, influence public officials, monitor government, hold public officials accountable, and maintain significant measures of control over their lives and communities.

Federalism offers citizens multiple points of access to public power as well, and, thus, opportunities to appeal to other governments on certain matters when one is unresponsive. Multiple governments can also check and balance each other in various ways, including competition and cooperation, thereby curbing centrifugal tendencies toward anarchy and centripetal tendencies toward monopoly.<sup>13</sup> In addition, multiple governments provide citizens with competing sources of information and with different perspectives on public-policy issues that might not be available from political parties or the media. Where citizens can also initiate policy or vote on policy in national and/or constituent referenda, they have opportunities to affect policy directly and to register opinions that may differ from those of political elites.<sup>14</sup>

<sup>12</sup>U.S. Constitution, Article IV, Section 4.

<sup>13</sup>See, e.g., Daphne A. Kenyon and John Kincaid, eds., *Competition among States and Local Governments: Efficiency and Equity in American Federalism* (Washington, D.C.: Urban Institute Press, 1991).

<sup>14</sup>See, e.g., Bruno S. Frey and Iris Bohnet, "Democracy by Competition: Referenda and Federalism in Switzerland," *Publius: The Journal of Federalism* 23 (Spring 1993): 71-81.

A critical question, however, especially for this form of federalism where the general government has constitutional obligations to guarantee general and constituent democracy, is whether federal democracy can work in the absence of systemwide commitment to liberal democratic values. The U.S. government, for example, has had little occasion to exercise the republican guarantee clause. Although it has intervened substantially in the conduct of state and local democratic governance in recent decades, it has done so on grounds of individual rights protection under the Fourteenth Amendment (1868) to the U.S. Constitution. There are, however, federal systems (e.g., Brazil, India, and Russia) where some constituent jurisdictions evidence little or no commitment to liberal democratic values. Assuming an adequately democratic general government, then under what circumstances should the general government be authorized to override or supplant an undemocratic or insufficiently democratic constituent government? The imposition of president's rule on states under Article 356 of the Indian Constitution, for example, has involved many abuses of union powers, often for partisan political purposes.<sup>15</sup>

Such questions are likely to be most salient in federal arrangements established largely to accommodate traditionalistic communal diversity. Most analyses of democratic and economic development in federal systems focus on uneven economic development and on asymmetries in the size and wealth of the constituent jurisdictions; consequently, fiscal remedies, such as national revenue-sharing or fiscal equalization, take on considerable importance. Such fiscal remedies may be a necessary condition and unifying symbol of the federal covenant, but they may also end up subsidizing inefficiencies and inequities and, in turn, reducing incentives for undemocratic constituent governments to develop politically as well as economically. The cultural distances between communal groups in some federal systems are vast, thereby exacerbating sensitivities about claims to national wealth while reserving the right to maintain less than modern, even anti-democratic, communal values against cosmopolitan interventions from the general government.

These questions point to the value of liberty in a federal arrangement as well. Liberty is among the highest values often to be secured by a federal arrangement. As James Madison wrote:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.<sup>16</sup>

As the U.S. Supreme Court later put it: "In the tension between federal and state power lies the promise of liberty."<sup>17</sup>

<sup>15</sup>Amal Ray with John Kincaid, "Politics, Economic Development, and Second-Generation Strain in India's Federal System," *Publius: The Journal of Federalism* 18 (Spring 1988): 147-167.

<sup>16</sup>Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), p. 323.

<sup>17</sup>*Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

A federal arrangement may endeavor to protect and enhance liberty by providing for:

- mutual consent in the formation and alteration of the union;
- a written constitution specifying and protecting the terms of union;
- a united defense against internal and external aggression;
- a diffusion of power to prevent the formation of an imperial center;
- participation by the constituent governments and their citizens in the makeup and operation of the general government;
- constitutional guarantees of constituent self-government and autonomy;
- guarantees of the territorial integrity of the constituent states or political communities;
- general and constituent government protections of individual rights;
- protections of both individual and communal diversity; and
- channels of appeal between governments.

Such mechanisms may be employed to protect communities and individuals against rights-destructive powers that might be exercised by the general government and also against anti-union and anti-rights powers that might be exercised by the constituent governments.

There is, however, a tension between the protection of two kinds of liberty in a federal system: individual liberty and communitarian liberty. Historically, federalism aimed first at protecting communitarian liberty, namely, the right of the constituent communities, especially communal societies, to govern themselves in all matters of local relevance and to maintain their ways of life. Where communitarian liberty is a predominant value to be secured through federalism, then the preferred form may be some type of confederalism wherein the general government has very limited authority to interfere with constituent self-governance in ways that might unglue communal solidarity.

Protecting communitarian liberty does indirectly protect individual liberty by preventing one communal group or an alliance of groups from unilaterally imposing costs on individuals of another communal group or depriving those persons of their lives, rights, lands, property, or historic identity through policies of discrimination, ethnic cleansing, or genocide. Every government that suppresses individual liberty must also destroy communitarian liberty.

However, curbing communitarian liberty may enhance individual liberty because small republics can be tyrannical too, and this may be all the more so in small communal republics. The most abhorrent example in U.S. history were federal guarantees of the liberty of southern states to maintain slavery and then racial segregation. These states' rights were the price of union exacted by the South at the Constitutional Convention of 1787. The undoing of this communitarian liberty required a civil war in the 1860s and massive legal interventions by the federal government into the southern states in the 1950s and 1960s.

Given that slavery is now condemned universally, it is perhaps not a good example. A positive example is Switzerland, where communitarian liberty remains prominent and largely benign. Nevertheless, a federal arrangement must confront the question of which powers of communitarian liberty are to be tolerated

within the union and which are not to be tolerated because they unduly infringe upon individual liberty. If the constituent communities are themselves liberal democracies with high levels of individual liberty, then expressions of communitarian liberty are likely to be less problematic voter-preference choices. If the constituent communities are more communal, however, then expressions of communitarian liberty are likely to take the form of exclusive cultural, ethnic, religious, and/or linguistic preferences. Interference by the general government with these preferences on behalf of individual liberty, especially for “foreigners,” has a sharp political edge because enhancements of individual rights corrode traditional communal ties.

In addition, communitarian liberty, even that of liberal democratic communities, poses barriers to interjurisdictional mobility which, itself, is a key attribute of individual political liberty in a federal arrangement and of individual economic liberty in a free common market. If a Muslim is not welcome in a Christian community, a black in a white community, or an English-speaker in a French-speaking community, then other values sought to be secured under federalism may be weakened accordingly.

Because of the legacy of slavery, and also because the United States does not yet have a constituent state comparable, for example, to Quebec in Canada, many Americans developed a distrust of communitarian liberty and explicitly or implicitly consented to a shift of the weight of individual rights protection from the states to the union via U.S. Supreme Court interpretations of the U.S. Constitution’s Fourteenth Amendment and, thereby, to federal statutory limits on communitarian liberty as well. In recent years, however, the conservative drift of the federal government has renewed interest in the authority of the states to protect individual rights independently of the federal government.

Under the new judicial federalism, state courts and legislatures may afford their citizens greater protections under their state constitution’s declaration of rights than the U.S. Supreme Court or the Congress is willing to recognize under the U.S. Constitution’s Bill of Rights.<sup>18</sup> Furthermore, if a rights-enhancing decision by a state supreme court is based on “independent and adequate” state constitutional grounds, it is immune from U.S. Supreme Court review. In effect, the federal government is now understood as establishing a floor of minimum rights protection nationwide, while each state is free to exceed any minimum federal rights standard. States also are free to protect rights not protected under the federal Constitution and to recognize new rights as well.<sup>19</sup> Consequently, peaks and valleys have appeared on the rights landscape as some states mostly cling to the federal floor while others build up from it.

In Canada, a different approach lies in Section 33 of the Charter of Rights and Freedoms. “This section allows both the federal and provincial legislatures to override important parts of the Charter by including in an act a clause stating that

<sup>18</sup>John Kincaid, “State Court Protections of Individual Rights Under State Constitutions: The New Judicial Federalism,” *Journal of State Government* 61 (September/October 1988): 163-169.

<sup>19</sup>Robert F. Williams, *State Constitutional Law: Cases and Materials* (2nd ed.; Charlottesville, Va.: Michie, 1993).

it shall operate notwithstanding the Charter. Such a legislative override is effective for five years, at which time it lapses unless explicitly re-enacted."<sup>20</sup> Although the inclusion of Section 33 was advanced mostly on the ground of protecting parliamentary supremacy against a potential federal judicial supremacy emerging from Charter enforcement, the notwithstanding clause shields provincial autonomy from federal intervention as well and, in effect, allows the provinces to drill holes in the federally established floor of individual rights protection. What restrains most provinces from drilling too many holes in the floor is the political fallout of appearing to be hostile to individual rights.

These federal experiences raise questions about the universality of rights and about different approaches to rights protection. They suggest, for one, that rights protection cannot be entrusted to a monopoly guardian, whether it be the national government or each constituent government acting monopolistically within its jurisdiction. If the American historical experience has been one of overcoming state tyrannies against individual rights, the historical experience in many other places has been one of overcoming central government tyrannies against individual rights. Under a federal arrangement, however, a democratically based process can be established for rights decisionmaking in which more than one supreme court or legislative forum is available to advance rights under conditions of human diversity.

Even where democratization produces demands for judicial protections of rights, unitary democratic systems with a single supreme court erected atop a pluralistic polity are likely to be buffeted by countervailing universalistic conceptions of rights held by democratic cosmopolitans and particularistic conceptions of rights held by the diverse provincial communities that make up the polity. Liberal conceptions of individual rights, especially their individualistic foundation, contradict the communal tenets of many cultures and are regarded in some quarters as Western cultural imperialism.

These American and Canadian experiences, therefore, confront the very difficult question of which rights should be treated as fundamental, universal, and uniform and which rights can be subject legitimately to variation among communities of people holding diverse values. In the liberal democratic tradition, prohibiting ethnic or racial discrimination in any jurisdiction is a fundamental, uniform rights requirement, but do abortion, the right to die, free speech in private shopping malls, prayer in local schools, sabbath closing laws, environmental rights, and a wide range of other rights issues all belong in the same fundamental category?

Judicial federalism allows rights not protected by a national government to be protected at least in some regional and local jurisdictions, which might also become safe havens for some citizens. Nationally unprotected rights may also include emerging rights, such as the right to die. Americans, for example, have gradually embraced this general concept, but have not yet formed a legal and

<sup>20</sup>Roger Gibbons, Rainer Knopff, and F. L. Morton, "Canadian Federalism, the Charter of Rights, and the 1984 Election," *Publius: The Journal of Federalism* 15 (Summer 1985): 166-167.

ethical consensus around it.<sup>21</sup>

This may be an important consideration because efforts to achieve too quickly, through unitary national institutions, uniform rights protections comparable to contemporary liberal international standards may generate so much conflict in some emerging pluralistic democracies as to produce violence, political paralysis, and more rights deprivations. The violence generated by the culturally divisive *Roe v. Wade*<sup>22</sup> decision on abortion in the United States, for example, has been mildly compared to the violence generated by socially sensitive rights issues in some other nations where social fissures are cultural chasms.

However, in a rights landscape of peaks and valleys, freedom of travel and interjurisdictional migration become especially important rights. Even a single peak jurisdiction protecting, for instance, women's rights in an otherwise hostile environment could become a refuge for women fleeing a country's rights deserts. The competitive pressures produced by interjurisdictional migration can have leveling-up effects on rights protection. Individual and family mobility can also loosen the bonds of communal cultures that suppress individual rights by compelling communal elites to respond to their constituents' exit behavior.

### EFFICIENCY, INNOVATION, AND EQUITY

Mobility and choice underlie values of efficiency, innovation, and equity that have frequently been attributed to federalism in more recent years. As U.S. Supreme Court Justice Louis D. Brandeis suggested in 1932, "a federal republic benefits from a system in which "a single courageous state may, if its citizens choose, serve as a laboratory, and try social and economic experiments without risk to the rest of the country."<sup>23</sup> Successful experiments may be adopted by other states or applied nationwide by the general government if it has authority to do so. In fact, considerable diffusion of innovation often does occur in some federal systems. More generally, by promoting unity without homogeneity, a federal arrangement seeks not only to enhance liberty but also to foster innovation and adaptation to change. An appropriate analogy may be the biodiversity that is essential for a healthy ecosystem.

Although federal arrangements are often said to be inefficient because there can be duplications of services, and decisionmaking may be protracted because of intergovernmental negotiations, modern experiences with centralized governments do not suggest that centralization is necessarily a more efficient or effective alternative. A federal system facilitates efficient deliveries of public goods insofar as it enables its multiple governments to provide public services that are economically appropriate to their territorial jurisdictions and responsive to citizens' general and particular needs and preferences. Furthermore, as changes in public preferences or changes in technology alter the appropriate territorial

<sup>21</sup>James M. Hoefler, "Diffusion and Diversity: Federalism and the Right to Die in the Fifty States," *Publius: The Journal of Federalism* 24 (Summer 1994): 153-170.

<sup>22</sup>410 U.S. 113 (1973).

<sup>23</sup>*New York Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

scope of service provision, responsibilities can be transferred between governments or shared among governments by cooperative agreements. Like any institutional structure, there will be turf wars and resistance to change; nevertheless, where most governments must finance most services from their own tax revenues and user fees, there will be incentives for change likely to be absent in bureaucratic structures, even decentralized structures, financed by central appropriations. In addition, if there is a market economy and a viable civil society, governments have further agility to reconfigure service provision through non-governmental production.

Federalism also permits citizens to "vote with their feet" by leaving, or threatening to leave, a jurisdiction so as to put pressure at least on constituent governments to match public services with public preferences. Short of leaving a jurisdiction, citizens can vote for or against candidates for public offices and otherwise seek to influence government. By providing for regional and local self-government and for freedom of interjurisdictional mobility, a federal arrangement gives citizens many choices of government jurisdictions offering different packages of taxes, public services, and civic values.<sup>24</sup> In extreme cases, citizens can flee oppressive jurisdictions, as did many African Americans who migrated out of the South to escape slavery and then legalized discrimination.

These values contribute to equity and justice as well. Where most domestic public goods and services are provided through self-governing constituent regional and local governments, service benefits are more likely to be matched to tax burdens relative to other jurisdictions, though not necessarily to individuals within a given jurisdiction. The matching of burdens and benefits relative to taxpayers within a jurisdiction will depend on the precise tax and fee structure. Free-riding is reduced with respect to jurisdictions, however, and citizens are more likely to get what they pay for, rather than paying for what they do not want, need, or get from government.

These values presuppose significant levels of self-government on the part of regional and local governments. They may also presuppose liberal democratic values able to ensure universal citizen participation and regional and local government responsiveness to voter preferences. Whether these values can be realized where federalism is largely valued as an accommodation of traditional communal diversity is questionable because some constituent communities will resist innovations, tolerate inefficiencies, and constrain mobility for the sake of sustaining certain communal values.

Even within a liberal democratic framework, the diversity produced by substantial regional and local self-government raises questions of whether differences actually constitute inequities or inequalities. Why should citizens of one jurisdiction receive services, or services at a lower cost, than citizens of another jurisdiction? If there are multiple governments, then citizens (and businesses) will be treated differently across the federal system. Furthermore, competition

<sup>24</sup>See, e.g., Charles M. Tiebout, "A Pure Theory of Local Expenditures," *Journal of Political Economy* 64 (October 1956): 416-424.

among jurisdictions for the most desirable citizens may drive down services for citizens regarded as less desirable.<sup>25</sup> Tocqueville believed that the modern passion for individual equality in liberal democracies would spell the death of federalism because citizens would less and less tolerate differences and more and more turn to centralized government to ensure thoroughgoing equality.

A federal arrangement can address these issues by allowing for mutual aid and redistribution of resources among citizens whose mobility choices are limited and among jurisdictions whose fiscal capacities for service provision are limited. All federal systems seem to have such policies, although they regularly generate controversy, especially political conflict over distribution formulas. Such redistributive policies also pose challenges to the balance of power in a federal arrangement because, generally, the higher the level of redistribution, the higher the level of tax extraction required by the general government. In exercising this power, the general government may constrain, legally and politically, the exercise of regional and local tax powers. For ostensible reasons of fiscal accountability, moreover, a general government may be reluctant to redistribute revenues without a heavy load of rules and regulations. In the final analysis, while redistribution may reduce direct, unmediated competition between constituent governments, it may exacerbate competition that must be mediated by general government institutions as constituent jurisdictions lobby competitively for maximal revenue distributions. Hence, instead of diffusing competitive pressures across governmental jurisdictions, competitive pressures may become concentrated within the general government in a more politically volatile manner.

Given the diversity of conceptions of justice and equality likely to exist in any federal arrangement, there appears to be a balance to be struck between the safety valve of diffusing certain disagreements across constituent governments and the necessity for union of concentrating certain disagreements within the mediating institutions of the general government while, at the same time, allowing for democratic decisionmaking processes that may shift the balance over time.

## CONCLUSION

Simpler solutions might be available for these issues, but the question is: Are they appropriate and even possible in certain circumstances under conditions of human diversity? A unitary approach can simply impose solutions either through autocratic policymaking or simple majority rule. A consociational approach involving elite accommodations, which may also occur in framing a federal arrangement, may produce simpler solutions as well, if elites genuinely represent popular wills. However, in democratizing environments with rising rights consciousness and spreading market economics, traditional elite accommodations become more politically problematic and less democratically legitimate.

<sup>25</sup>Kenyon and Kincaid, *Competition among States and Local Governments*; Paul E. Peterson and Mark C. Rom, *Welfare Magnets: A New Case for a National Standard* (Washington, D.C.: Brookings Institution, 1990).



Federal arrangements necessarily involve difficult choices and value tradeoffs as well as questions of balance that may require continual negotiations because there is no simple formulaic approach to how people covenant together in a reasonably voluntary manner. Consequently, at the core of federal arrangements lie the establishment and maintenance of power-sharing relationships, rather than structures per se, among self-governing jurisdictions which seek to accommodate or maximize certain values appropriate to their common circumstances.